

**REMARKS**

Claims 13 to 30 are now pending.

Reconsideration is respectfully requested based on the following.

Claims 13 to 30 were rejected under 35 U.S.C. § 103(a) as being unpatentable in view of U.S. Patent No. 7,124,027 ("Ernst").

To reject a claim under 35 U.S.C. § 103(a), the Office bears the initial burden of presenting a *prima facie* case of obviousness. *In re Rijckaert*, 9 F.3d 1531, 1532, 28 U.S.P.Q.2d 1955, 1956 (Fed. Cir. 1993). To establish *prima facie* obviousness, three criteria must be satisfied. First, there must be some suggestion or motivation to modify or combine reference teachings. *In re Fine*, 837 F.2d 1071, 5 U.S.P.Q.2d 1596 (Fed. Cir. 1988). This teaching or suggestion to make the claimed combination must be found in the prior art and not based on the application disclosure. *In re Vaeck*, 947 F.2d 488, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991).

Also, as clearly indicated by the Supreme Court in *KSR*, it is "important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the [prior art] elements" in the manner claimed. *See KSR Int'l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727 (2007). In this regard, the Supreme Court further noted that "rejections on obviousness cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *Id.*, at 1396. Second, there must be a reasonable expectation of success. *In re Merck & Co., Inc.*, 800 F.2d 1091, 231 U.S.P.Q. 375 (Fed. Cir. 1986). Third, the prior art reference(s) must teach or suggest all of the claim features. *In re Royka*, 490 F.2d 981, 180 U.S.P.Q. 580 (C.C.P.A. 1974).

The Office has maintained and made final the previous rejection. Essentially, the Office conclusorily asserts that the feature of claim 13 of "assuming that the preceding vehicle performed a deceleration" is somehow provided by the Ernst reference. In fact, claim 13 evaluates under an assumed event, which is that the preceding vehicle has performed a deceleration. The Ernst reference makes an assumption about a future condition. Assuming that an event occurs, and assuming that an event will occur in the future are two different features, and the latter does not disclose the former. However, to facilitate prosecution, claim 13, as presented, provides the feature of "assuming that the

preceding vehicle initiated a deceleration.” The Ernst reference makes no such assumption and therefore does not disclose all of the features of claim 13, as presented.

Still further, the Office acknowledges that the Ernst reference does not disclose the feature of “a function of a reaction time of the driver and *a maximum possible deceleration of the motor vehicle.*” Instead, the Office conclusorily asserts that “it can be seen that a trade-off exists between the warning times and driver braking force,” and “that the amount of braking force used in determining whether an accident is avoidable is obviously interchangeable.” (Final Office Action at page 4). Even if there may be a trade-off between these two considerations, the cited art plainly teaches away from the claimed subject matter.

In this regard, the Ernst reference specifically states that the “system 100 *should* provide a user with a warning in time for the user to avoid a collision without having t[o] break the vehicle 102 *at a braking level that exceeds a braking threshold at which the user is comfortable.*” (Ernst, col. 19, line 65 to col. 20, line 2) (emphasis added). It is therefore abundantly plain that the Ernst reference specifically teaches away from any calculation involving “a maximum possible deceleration of the motor vehicle”, as provided for in the context of claim 13.

Notwithstanding the conclusory assertion by the Office that “[i]t is possible for the maximum possible deceleration of the motor vehicle to be comfortable to some drivers,” there is simply no support for this in the Ernst reference -- which inarguably teaches toward the opposite end of that continuum. To teach toward one end of a continuum is to teach away from the opposite end.

Accordingly, claim 13 is allowable, as are its dependent claims 14 to 20.

Claim 21 includes features like those of claim 13, and is therefore allowable for essentially the same reasons as claim 13, as are its dependent claims 22 to 24.

*As further regards all of the obviousness rejections, any Official Notice is respectfully traversed to the extent that it is maintained and it is requested that the Examiner provide specific evidence to establish those assertions and/or contentions that may be supported by the Official Notices under 37 C.F.R. § 1.104(d)(2) or otherwise. In particular, it is respectfully requested that the Examiner provide an affidavit and/or that the Examiner provide published information concerning these assertions. This is because the § 103 rejections are apparently being based on assertions that draw on facts within the personal*

*knowledge of the Examiner, since no support was provided for these otherwise conclusory and unsupported assertions. (See also MPEP § 2144.03).*

In summary, all of claims 13 to 30 are allowable.

**CONCLUSION**

In view of the foregoing, all of claims 13 to 30 are allowable. It is therefore respectfully requested that the rejections (and any objections) be withdrawn. Prompt reconsideration and allowance of the present application are therefore respectfully requested.

Respectfully submitted,

KENYON & KENYON LLP

Dated: 4/20/09

By: 

Gerard A. Messina  
(Reg. No. 35,952)

One Broadway  
New York, NY 10004  
(212) 425-7200

*Handwritten notes:*  
reg no. 33,865  
Hara C.  
Des 1724)